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IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

—v.—

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Did the President of the United States act within his authority when he determined that the states must comply with the United States's treaty obligation to give effect to the judgment of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31, 2004) (No. 128), in the cases of the 51 nationals of Mexico named in the judgment?

2. Are state courts bound by the Constitution to honor the undisputed international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the *Avena* judgment in the cases that the judgment addressed?

PARTIES

All parties to the proceedings below are named in the caption of the case.

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OPINION BELOW

The decision of the Court of Criminal Appeals of Texas (Pet. App. 1a-79a), has been designated for publication in S.W.3d, but the volume and page numbers are not yet available. It is available at 2006 WL 3302639 and 2006 Tex. Crim. App. LEXIS 2236.

JURISDICTION

The final judgment of the Texas Court of Criminal Appeals, that state's court of last resort in criminal matters, was issued on November 15, 2006. Petitioner filed a timely petition for certiorari on January 16, 2007. This Court granted certiorari on April 30, 2007. This Court has jurisdiction pursuant to Article III, § 2, of the United States Constitution, and 28 U.S.C. § 1257(a).

CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions (Pet. App. 80a-85a): United States Constitution, art. II, § 1, sentence 1; *id.* § 2, cls. 2-3; *id.* § 3; United States Constitution, art. VI, cl. 2; Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, art. I, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 325, 596 U.N.T.S. 487 (the "Optional Protocol"); United Nations Charter, art. 94(1), T.S. No. 993, 59 Stat. 1031, 1051 (opened for signature June 26, 1945) (the "UN Charter"); Statute of the International Court of Justice, arts. 36(1), 59-60, T.S. No. 993, 59 Stat. 1031, 1060, 1062-63 (opened for signature June 26, 1945) (the "ICJ Statute"); United Nations Participation Act of 1945, §§ 2(a), 3, *codified as amended at* 22 U.S.C. §§ 287(a), 287a; Rev. Stat. § 2001,

codified as amended at 22 U.S.C. § 1732; Omnibus Diplomatic Security and Antiterrorism Act of 1986, § 103(a)(1)(D), *codified as amended at* 22 U.S.C. § 4802(a)(1)(D); and Texas Code of Criminal Procedure, art. 11.071, § 5(a), (d)-(e).

STATEMENT OF THE CASE

Petitioner José Ernesto Medellín, a national of Mexico who was sentenced to death in Texas in proceedings that violated his right to consular notification under Article 36 of the Vienna Convention on Consular Relations, seeks review and reconsideration of his conviction and sentence in accordance with a binding judgment of the International Court of Justice and a determination by the President of the United States that this country will comply with that judgment.

A. The United Nations Charter and the International Court of Justice

The International Court of Justice is "the principal judicial organ of the United Nations." UN Charter, art. 92. By ratifying the UN Charter—a treaty to which over 190 nations, including the United States and Mexico, have subscribed—a nation "undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." *Id.*, art. 94(1) (Pet. App. 81a).

All parties to the UN Charter "are *ipso facto* parties to the Statute of the International Court of Justice," UN Charter, art. 93(1), which forms "an integral part of the Charter," *id.*, art. 92. Under the ICJ Statute, a judgment in a case submitted to the ICJ is "final and without appeal," ICJ Statute, art. 60, but is binding only

"between the parties and in respect of that particular case," *id.*, art 59 (Pet. App. 82a).

The United States proposed the ICJ Statute and led the effort to create the Court. RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945, at 865 (1958). The United States saw the Court as a means to pursue its longstanding objective to promote the rule of law on the international level:

> Throughout its history the United States has been a leading advocate of the judicial settlement of international disputes. Great landmarks on the road to the establishment of a really permanent international court of justice were set by the United States. . . . As the United States becomes a party to [the U.N.] Charter, . . . it would naturally accept and use an international court to apply international law and to administer justice.

Edward R. Stettinius, Jr., Sec'y of State & Chairman of U.S. Delegation, *Charter of the United Nations: Report to the President on the Results of the San Francisco Conference* 137-38 (1945). To date, the United States has brought ten cases to the Court either as an applicant or by special agreement with another state, and in another eleven cases, the United States has been a respondent.[1]

The ICJ's jurisdiction in any particular case depends entirely on the consent of the parties. ICJ Statute, art. 36(1) (Pet. App. 82a). A state may consent generally to the ICJ's jurisdiction on any question arising under a treaty or general international law, *id.*, art. 36(2), or it

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[1] *See* International Court of Justice: Contentious Cases Ordered by Countries Involved, at http://www.icj-cij.org/docket/index.php?p1=3&p2=3&p3=1 (last visited June 27, 2007).

may consent, by a separate treaty or special arrangement, to the ICJ's jurisdiction over a category of cases or a specific dispute, *id.*, art. 36(1). Hence, by ratifying the UN Charter and ICJ Statute, the United States agreed to abide by judgments in any case to which it was a party, but it did not consent to jurisdiction in any particular case.[2]

The Senate approved the UN Charter, along with the attached ICJ Statute, on July 28, 1945, and President Truman signed it on August 8, 1945. In ratifying the UN Charter, the United States made explicit that it was also ratifying the ICJ Statute. *See* Proclamation of Ratification of UN Charter and ICJ Statute, 59 Stat. 1031, 1031 (1945).

B. The Vienna Convention on Consular Relations

The Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 ("Vienna Convention"), provides a comprehensive framework for the work of consular officials. Currently, 171 nations are parties to the Vienna Convention.[3]

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[2] Initially, the United States consented to the general jurisdiction of the ICJ, Declaration by the President of the United States of America August 14, 1946 Respecting Recognition by the United States of America of the Compulsory Jurisdiction of the International Court of Justice, 61 Stat. 1218 (1947), but after commencement of the case in *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), it withdrew that consent, *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1984 I.C.J. 392, 398 (Jurisdiction and Admissibility Judgment of Nov. 26). It remains party to dozens of agreements conferring jurisdiction on the Court over specific categories of disputes. *See* International Court of Justice, Jurisdiction: Treaties, at http://www.icj-cij.org/jurisdiction/ index.php?p1 =5&p2=1&p3=4 (last visited June 27, 2007); U.S. Dept' of State, Treaties in Force 2006: Multilateral Treaties and Other Agreements, at http://www.state.gov/s/l/treaty/treaties/2006/83254.htm (last visited June 27, 2007).

[3] *See* Multilateral Treaties Deposited with the Secretary-General: Vienna Convention on Consular Relations, at http://untreaty.un.org/

Among other things, Article 36 of the Vienna Convention requires the competent authorities of the detaining state to notify "without delay" a detained foreign national of his right to request assistance from the consul of his own state and, if the national so requests, to inform the consular post of that national's arrest or detention, also "without delay." The rights afforded by Article 36 are critical to United States consular officers' efforts to protect American citizens living, working, and traveling abroad. *See* Br. for U.S. as Amicus Curiae Supporting Resp't at 43, *Medellín v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928); Br. for U.S. as Amicus Curiae on Pet. for Cert. at 12. While the United States has vigorously insisted on strict compliance with Article 36 when Americans have been detained overseas, compliance in the United States has been poor. *See, e.g., Medellín v. Dretke*, 544 U.S. at 674 (O'Connor, J., dissenting) (noting "vexing problem" of "individual States' (often confessed) noncompliance" with Article 36).

The Optional Protocol to the Vienna Convention provides that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol, art. I. It constitutes a specific consent to jurisdiction under Article 36(1) of the ICJ Statute. Of the 171 nations that have ratified the Vienna Convention, 46 have also ratified the Optional Protocol.[4]

ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty31.asp (last visited June 26, 2007).

[4] *See* Multilateral Treaties Deposited with the Secretary-General: Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty33.asp (last visited June 26, 2007). On March 7, 2005, the United States gave notice that it intended to withdraw from the

The United States played a leading role at the 1963 diplomatic conference that produced the Vienna Convention and its Optional Protocol. *See* Report of the United States Delegation to the United Nations Conference on Consular Relations in Vienna, Austria, March 4 to April 22, 1963, *reprinted in* S. Exec. Doc. E, 91st Cong., at 59-61 (1st Sess. 1969). Among other things, the United States proposed the binding dispute settlement provisions that became the Optional Protocol and successfully led the resistance to efforts by other States to weaken or eliminate altogether those provisions. *See id.* at 72-73.

The United States signed the Vienna Convention and its Optional Protocol on April 24, 1963, and President Nixon sent it to the Senate on May 8, 1969. The Senate held hearings on October 7, 1969, and unanimously approved the instruments on October 22, 1969. *See* 115 CONG. REC. 30,997 (Oct. 22, 1969).

C. Mr. Medellín's Conviction, Sentence, and Initial Collateral Proceedings

On June 29, 1993, law enforcement authorities arrested Mr. Medellín, 18 years old at the time, in connection with the murders of two young women in Houston, Texas. Mr. Medellín, a Mexican national, told the arresting officers that he was born in Mexico and informed Harris County Pretrial Services that he was not a United States citizen. Nevertheless, Mr. Medellín was not advised of his Article 36 right to seek assistance from the Mexican consul, nor was the Mexican consulate ever notified of his detention. Mr. Medellín was unaware

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Optional Protocol. *See* U.S. Dep't of State, Daily Press Briefing, Mar. 10, 2005, available at http://www.state.gov/r/pa/prs/dpb/2005/43225.htm (last visited June 27, 2007).

of his right to seek consular assistance at any time either before or during his capital trial.[5]

On September 16, 1994, Mr. Medellín was convicted of capital murder and, on October 11, 1994, sentenced to death. On March 16, 1997, the Texas Court of Criminal Appeals affirmed Mr. Medellín's conviction and sentence in an unpublished order.

On April 29, 1997, Mexican consular authorities first learned of Mr. Medellín's detention when he wrote to them from death row, and they promptly began rendering him assistance. On March 26, 1998, Mr. Medellín filed a state application for a writ of habeas corpus arguing, among other things, that his conviction and sentence should be vacated as a remedy for the violation of his Article 36 rights. The trial court denied relief and, by unpublished order dated September 7, 2001, the Texas Court of Criminal Appeals again affirmed.

On November 28, 2001, Mr. Medellín filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Texas, and on July 18, 2002, an amended petition. Mr. Medellín again raised, among others, an Article 36 claim. On June 26, 2003, the District Court denied his petition.

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[5] At the time Mr. Medellín was arrested and tried, Mexican consular officers routinely assisted capital defendants by providing funding for experts and investigators, gathering mitigating evidence, acting as a liaison with Spanish-speaking family members, and most importantly, ensuring that Mexican nationals were represented by competent and experienced defense counsel. *See* Memorial of Mexico at 11-38, *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) (No. 128); *see also Valdez v. State*, 2002 OK CR 20, ¶25, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (finding that Mexico would have provided critical resources in 1989 capital murder trial of Mexican national).

D. The *Avena* Case in the International Court of Justice

In early 2003, Mexico initiated proceedings against the United States in the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, seeking a remedy for violations of the Vienna Convention rights of individual Mexican nationals who were then under sentence of death in the United States. Mexico invoked the United States's consent to jurisdiction in the Optional Protocol.

The United States fully participated in the *Avena* proceedings. After extensive briefing and a week-long hearing, the ICJ rendered a judgment that expressly adjudicated Mr. Medellín's own rights and those of the 51 other Mexican nationals. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) (Pet. App. 86a-186a). Specifically, the ICJ held that the United States had breached Article 36(1)(b) of the Vienna Convention in the cases of 51 of the Mexican nationals, including Mr. Medellín, by failing "to inform detained Mexican nationals of their rights under that paragraph" and "to notify the Mexican consular post of the[ir] detention." *Avena*, ¶¶ 106(1)-(2), 153(4) (Pet. App. 155a-156a, 183a). The ICJ held further that in 49 of those cases, including that of Mr. Medellín, the United States had also violated its obligations under Article 36(1)(a) "to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1(c) of that Article regarding the right of consular officers to visit their detained nationals." *Id.*, ¶¶ 106(3), 153(5)-(6) (Pet. App. 156a, 183a-184a). Finally, the ICJ held that in 34 cases, again including that of Mr. Medellín, the United States had also violated its obligation under Article 36(1)(c) "to enable Mexican consular officers to arrange for legal

representation of their nationals." *Id.*, ¶¶ 106(4), 153(4), 153(7) (Pet. App. 156a, 183a, 184a).

As to remedies, the ICJ first denied Mexico's request for annulment of the convictions and sentences. *Id.*, ¶ 123 (Pet. App. 166a). However, recognizing that Article 36(2) of the Convention requires the laws of the signatory states to give "full effect" to the purposes of the rights accorded by Article 36, the ICJ held that United States courts must provide review and reconsideration of the convictions and sentences of the 51 Mexican nationals as a remedy for the violations of Article 36(1) in their cases. *Id.*, ¶¶ 121-22, 153(9) (Pet. App. 165a, 185a). The ICJ specified that, *first*, the required review and reconsideration must take place as part of the "judicial process;" *second*, procedural default doctrines could not bar the required review and reconsideration; *third*, the review and reconsideration must take account of the Article 36 violation on its own terms and not require that it qualify also as a violation of some other procedural or constitutional right; and *finally*, the forum in which the review and reconsideration would occur must be capable of "examin[ing] the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." *Id.*, ¶¶ 113-14, 122, 134, 138-39, 140 (Pet. App. 160a-161a, 165a, 170a-171a, 173a-174a).

E. Proceedings in the Fifth Circuit and This Court

The *Avena* judgment was handed down while Mr. Medellín's application for a certificate of appealability from the denial of federal habeas relief was pending before the Fifth Circuit. Although the effect of the *Avena* judgment had not been briefed or argued, the Fifth Circuit considered the judgment before following prior Fifth Circuit precedent holding that Article 36 of the Vienna Convention was not judicially enforceable.

Medellín v. Dretke, 371 F.3d 270 (5th Cir. 2004). Mr. Medellín petitioned for certiorari on the question of the effect in courts in the United States of the adjudication of his own rights in *Avena*, and this Court granted.

F. The President's Determination

On February 28, 2005, after Mr. Medellín had submitted his opening brief in this Court, President George W. Bush issued a signed, written determination that state courts must provide the required review and reconsideration to the 51 Mexican nationals named in the *Avena* judgment, including Mr. Medellín, notwithstanding any state procedural rules that might otherwise bar review of their claims. The President declared:

> I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

Pet. App. 187a.

The President's determination was attached as an exhibit to the United States's brief as *amicus curiae* which was filed the same day in Mr. Medellín's case. Br. for U.S. as Amicus Curiae Supporting Resp't at 8a, *Medellín v. Dretke*. In that brief, the United States explained that the President had determined that the United States had a "paramount interest . . . in prompt compliance" with the *Avena* judgment. *Id.* at 41. Specifically, the President had determined that compliance would "serve[ ] to protect the interests of United States citizens abroad, promote[ ] the effective conduct of for-

eign relations, and underscore[] the United States's commitment in the international community to the rule of law." *Id.* at 9. The United States stressed that "[c]onsular assistance is a vital safeguard for Americans abroad, and the government has determined that, unless the United States fulfills its international obligation to achieve compliance with the ICJ *Avena* decision, its ability to secure such assistance could be adversely affected." *Id.* at 41.

The United States explained that pursuant to the President's determination, an individual Mexican national named in the judgment "may file a petition in state court seeking [the] review and reconsideration [ordered in *Avena*], and the state courts are to recognize the *Avena* decision." *Id.* at 42. In such a case, "a state court would not be free to reexamine whether the ICJ correctly determined the facts or correctly interpreted the Vienna Convention." *Id.* at 46. Finally, state procedural rules that might otherwise prevent a state court from giving effect to the *Avena* judgment "must give way." *Id.* at 43.

G. This Court's Dismissal of Certiorari

In deference to the President's determination directing claims for review and reconsideration to the state courts, Mr. Medellín filed a motion to stay his case in this Court, requesting that the case be held in abeyance while Mr. Medellín exhausted in state court his claims based on *Avena* and the President's determination—neither of which existed at the time of his first state post-conviction petition. In order to ensure compliance with any applicable statute of limitations, Mr. Medellín filed the contemplated petition for a writ of habeas corpus in the Texas Court of Criminal Appeals while his case was pending before this Court, and he asked the Texas court to hold his petition in abeyance until this Court ruled on his motion for a stay.

On May 23, 2005, this Court dismissed the writ of certiorari as improvidently granted, "[i]n light of the possibility that the Texas courts [would] provide Medellín with the review he seeks pursuant to the *Avena* judgment and the President's memorandum." *Medellín v. Dretke*, 544 U.S. 660 (2005) (*per curiam*). The Court noted that it could later review the questions presented, "unencumbered by the issues that arise from the procedural posture" of a federal habeas case, following the resolution of Mr. Medellín's subsequent state habeas action. *Id.* at 664 n.1; *see also id.* at 669 (Ginsburg, J., concurring); *id.* at 694 (Breyer, J., dissenting).

H. The Proceedings Below

Following this Court's dismissal, the Texas Court of Criminal Appeals set Mr. Medellín's habeas petition for briefing and oral argument on whether it satisfied the requirements of Article 11.071, § 5, of the Texas Code of Criminal Procedure ("Section 5"). *Ex parte Medellín*, 206 S.W.3d 584 (Tex. Crim. App. 2005) (order directing briefing). Section 5 is the Texas provision governing subsequent applications by petitioners who have previously sought post-conviction relief.

In both his petition and his brief, Mr. Medellín argued that the *Avena* judgment and the President's determination to comply with it constituted binding federal law that, by virtue of the Supremacy Clause of the United States Constitution, preempted any inconsistent provisions of Texas law, including Section 5. Mr. Medellín also argued that, in any case, he satisfied the requirements of Texas law. As *amicus curiae*, the United States urged the Texas court to grant Mr. Medellín the review and reconsideration he sought, on the ground that President's determination constituted preemptive federal law. Br. for U.S. as Amicus Curiae at 49-50, *Ex parte Medel-*

lín, No. AP-75,207, 2006 WL 3302639 (Tex. Crim. App. Nov. 15, 2006).

On September 14, 2005, the Court of Criminal Appeals heard oral argument from Mr. Medellín, the State of Texas, and the United States. On November 15, 2006, that Court dismissed Mr. Medellín's application, holding that he did not satisfy Section 5 and that neither *Avena* nor the President's determination preempted that provision. Pet. App. 1a-79a.

With respect to the *Avena* judgment, Judge Keasler wrote on behalf of a majority to hold that Mr. Medellín's claim was foreclosed by *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), which, the Texas court observed, had interpreted the Vienna Convention in a manner inconsistent with the *Avena* judgment. Pet. App. 20a. "In this case," the court concluded, "we are bound by the Supreme Court's determination that ICJ decisions are not binding on United States courts." *Id.* at 24a. The Texas court did not address the question of whether the *Avena* judgment, as Mr. Medellín had argued, would still be binding in the cases of individuals like him whose rights had been expressly adjudicated by the ICJ (unlike the petitioners in *Sanchez-Llamas*) regardless of whether United States courts would reach the same interpretation.[6]

With respect to the President's determination, the Texas court was divided, with no single rationale commanding a majority. Judge Keasler, joined by Judges Meyers, Price, and Hervey, found that the President had "exceeded his inherent constitutional foreign affairs authority by directing state courts to comply with

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[6] *See* Subsequent Application for Post-Conviction Writ of Habeas Corpus, at 20-23, *Ex parte Medellín*; Br. of Applicant at 36, 41-43, 51, *Ex parte Medellín*.

Avena." *Id.* at 45a. Specifically, Judge Keasler concluded that "the President has exceeded his constitutional authority by intruding into the independent powers of the judiciary." The President, she continued, "cannot dictate to the judiciary what law to apply or how to interpret the applicable law." *Id.* at 30a.

Judge Keasler then considered the President's foreign affairs authority under Article II. While acknowledging the President's authority to "settle international controversies[,] comply with treaty obligations[, and] negotiate and enter into an executive agreement to settle a dispute with a foreign nation," she reasoned that because the President's determination was not supported by an executive agreement with Mexico, he had exceeded that authority. *Id.* at 45a-47a. She also held insufficient to justify the President's determination his duty under Article II, § 3, faithfully to execute the laws, his statutory duty to protect American citizens abroad, and his statutory authorization to represent the United States before the United Nations. *Id.* at 47a-55a.

Presiding Judge Keller delivered an opinion concurring in the judgment, stating that the President's "unprecedented, unnecessary, and intrusive exercise of power over the Texas court system cannot be supported by the foreign policy authority conferred on him by the United States Constitution," *id.* at 71a, and suggesting that, at a minimum, a new treaty would be required to give effect to the *Avena* judgment, *id.* at 68a-69a. Judge Cochran, writing for herself and Judges Johnson and Holcomb, found that the President's determination was without effect because it was not written in a "manner prescribed for Presidential Proclamations or Executive Orders," but rather appeared to be "written in a private memo style." *Id.* at 78a-79a. Judge Womack concurred in the result without opinion. *Id.* at 64a.

Having found that neither the President's determination nor the *Avena* judgment constitutes binding federal law, the Court of Criminal Appeals concluded that it could not preempt Texas's Section 5. The court then went on to interpret that provision to bar Mr. Medellín's application on grounds of procedural default, and on that basis, dismissed it. Pet. App. 63a-64a.[7]

Mr. Medellín petitioned for certiorari, and on April 30, 2007, this Court granted. *Medellín v. Texas*, 127 S. Ct. 2129 (2007).

SUMMARY OF ARGUMENT

The President of the United States has acted to give effect to the Nation's obligation, under duly ratified treaties, to abide by the *Avena* judgment in the cases of the 51 Mexican nationals named in the judgment. In making that determination, the President entered into no new international agreements, prescribed no new rules, established no new procedures, and undertook no new obligations. Instead, he merely confirmed that the United States would comply with international commitments already made by the constitutionally designated political actors, and would do so through the post-conviction review procedures already provided by state law. No more modest exercise of his foreign affairs authority, nor any with clearer authorization from the appropriate

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[7] Following the Texas court's decision, in order to ensure that his rights were preserved under any applicable statute of limitations, Mr. Medellín filed a habeas corpus petition in the United States District Court for the Southern District of Texas. *See Lawrence v. Florida*, 127 S. Ct. 1079 (2007) (filing of certiorari petition to review state-court decision does not toll time limit for federal habeas). At the same time, Mr. Medellín applied for a stay pending disposition of this case, which the District Court granted. *Medellín v. Quarterman*, No. 4:06cv3688 (S.D. Tex. May 25, 2007) (order).

political branches, can be imagined. The Texas Court of Criminal Appeals, in suggesting that the President had stepped over the bounds of executive authority and into the realm of lawmaking, misunderstood the nature of the President's determination and the scope of federal foreign affairs authority, as well as the extent of its own obligation to give effect to treaty obligations as federal law.

The United States agreed to comply with the ICJ's decisions, in cases to which the United States was a party, by three treaties ratified by the President with the advice and consent of the Senate: the United Nations Charter, the Statute of the International Court of Justice, and the Optional Protocol to the Vienna Convention on Consular Relations. None of the parties with a direct interest in this case—the United States, Texas, Mexico and Mr. Medellín—disputes that the United States has an international treaty obligation to give effect to the *Avena* judgment in the cases of the 51 individual Mexican nationals whose cases the ICJ adjudicated in *Avena*. Although this Court has held that the ICJ's reasoning has no binding *precedential* effect in future cases, it is undisputed that, by treaty, its judgments are binding in the particular cases they resolve. The Supremacy Clause in Article VI of the United States Constitution incorporates this undisputed treaty obligation into our domestic law by making treaties the "supreme Law of the Land" on a par with acts of Congress.

The Supremacy Clause, together with Article III, also makes explicit that state and federal courts are to enforce treaties as law in cases within their respective jurisdictions. Thus, this Court has consistently held that where a treaty provides a rule by which the rights of the litigants may be determined, courts must resort to the treaty for the rule of decision in the same manner as they

would resort to an act of Congress. The review and reconsideration ordered by *Avena* is just such a rule, as it is susceptible of enforcement only by judicial processes.

In addition, the Constitution places with the President the authority to "take Care that the Laws be faithfully executed." Both historical practice and this Court's decisions make clear that this authority affords the President discretion to determine the means of enforcement of statutes and treaties to the extent not specified by Congress or the treaty, and to take such other steps as may be necessary to ensure that the powers that the Constitution gives to the federal government can be carried into effect. Here, the President has confirmed that the *Avena* judgment must be given effect in state courts. He has thereby eliminated any possible objection that further federal action might be necessary before the *Avena* judgment would become enforceable in the domestic courts, as well as any possible concern that state courts' compliance with their obligation to enforce treaties might interfere with federal conduct of the Nation's foreign affairs.

The Constitution also confers on the President independent authority to formulate and execute the Nation's foreign policy. That authority is at its zenith where the President acts in accordance with an act of Congress—or, as here, with a treaty ratified with supermajority consent of the Senate, which by the Constitution is federal law on a par with an act of Congress. Exercising his foreign affairs authority, the President has determined that "expeditious compliance" with the *Avena* judgment is in the "paramount interest" of the United States. As the United States has explained, by ordering compliance, the President pursued two critical objectives: the need for the United States to resolve a dispute with a foreign gov-

ernment and fulfill its international obligations, and the need to preserve the United States's ability to protect Americans abroad.

The President's determination constitutes a quintessential foreign policy judgment that lies at the core of his foreign relations authority. The President has done nothing more than determine that the United States will do what the elected representatives of the American people, by the treatymaking processes prescribed by the Constitution, have already promised: to abide by a judgment of the ICJ in a case to which the United States was a party. Congress also has confirmed by statute the power of the President to act in this sphere. But in any event, this Court has repeatedly recognized that the President has authority to resolve disputes with foreign powers even without the participation of the Senate or an act of Congress. The authority exercised here, to give effect to the result of a dispute resolution mechanism established by duly ratified treaty, is far more modest.

The decision of the Texas Court of Criminal Appeals rested on its assumption that an "executive agreement" was needed to preempt state law. This misses the point entirely. The international agreement that the Texas court believed was necessary already exists, in the ratified treaties that obligate the United States to abide by judgments of the ICJ in cases to wnich it was a party. The conclusion of an additional executive agreement would not perform any useful function: Mexico has made clear that it seeks compliance with the *Avena* judgment, and the United States has made clear that it intends to comply.

The treaty obligation to abide by the *Avena* judgment and the President's determination that the United States will do so preempt any contrary state law. The *Avena* judgment entitles Mr. Medellín to review and reconsideration, which must fully examine the violation of his

consular notification rights and its effect on his conviction and sentence. Invoking a Texas procedural default statute, the Texas court denied him the required review and reconsideration. Because, in the circumstances of this case, application of this provision of state law directly conflicts with the President's exercise of his constitutional authority and with the treaty obligation to comply with the *Avena* judgment, the Texas court erred on a matter of federal law.

This Court should ensure that the United States keeps faith with its treaty partners by holding that Mr. Medellín is entitled to the review and reconsideration that the ICJ ordered.

ARGUMENT

I. As a Matter of Both International Law and United States Law, the *Avena* Judgment Is Binding.

A. The United States Is Bound by Treaty to Comply with the *Avena* Judgment.

When it ratified the United Nations Charter, the United States "undert[ook] to comply with the decision of the International Court of Justice in any case to which it is a party." UN Charter, art. 94(1). At the same time, by ratifying the ICJ Statute, the United States agreed that a decision of the ICJ in a case to which the United States was a party would have "binding force . . . between the parties and in respect of that particular case" and be "final and without appeal." ICJ Statute, arts. 59-60. Even without the treaty commitment reflected in the UN Charter and ICJ Statute, the United States would still have a treaty obligation to comply with any judgment rendered by the ICJ by virtue of the

jurisdiction conferred by the Optional Protocol, as an agreement between two nations to submit a dispute to an international body for decision implies an agreement to abide by the result. *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899).

When a nation enters into a treaty, it undertakes an international obligation that binds all of its organs (executive, legislative and judicial) and all its constituent jurisdictions (state and federal). *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 321 cmt. b (1987). Hence, by binding itself to comply with a judgment of the ICJ in a case to which it was a party, the United States bound all the states, including Texas, and all its judicial organs, including the Texas courts.

"[A] treaty is only another name for a bargain." THE FEDERALIST NO. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961). Consistent with the basic legal principles underlying all contracts, the parties' consent invests the treaty with binding force. RESTATEMENT, *supra*, § 312(1). Making decisions about their own interests, nations accept binding treaty obligations so that they may obtain reciprocal rights or other valuable commitments from their treaty partners. *See, e.g.*, THE FEDERALIST NO. 64, *supra*, at 394 ("[I]t would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it.") (emphasis in original). Thus, the obligation to perform treaty obligations—the rule of *pacta sunt servanda*—"lies at the core of the law of international agreements and is perhaps the most important principle of international law." RESTATEMENT, *supra*, § 321 cmt. a.

At the time of the filing of *Avena* and the rendering of the judgment, the United States was a party to the

Optional Protocol.[8] Hence, by virtue of that Protocol, the UN Charter, and the ICJ Statute, it was under an obligation to comply with that judgment. None of the parties with a direct interest in this case—the United States, Texas, Mexico, and Mr. Medellín—disputes that obligation.[9]

The Texas court's apparent conclusion that in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), this Court directed courts in the United States to breach that obligation is plainly mistaken. In *Sanchez-Llamas*, the issue of whether Article 36 of the Vienna Convention preempts procedural default rules was raised by Mario Bustillo, a national of Honduras, whose case was not before the ICJ in *Avena*. *See Sanchez-Llamas*, 126 S. Ct. at 2676, 2682-87. The other petitioner, Moises Sanchez-Llamas, though a Mexican national, was not one of the 51 expressly named in the *Avena* judgment. This Court observed that "[t]he ICJ's decisions have '*no binding force* except between the parties and in respect of that particular case.' " *Id.* at 2684 (quoting ICJ Statute, art. 59) (emphasis in original). The Court concluded that since the ICJ's interpretations are "not binding precedent

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[8] In withdrawing from the Optional Protocol, the United States made clear that it continues to be bound by the Vienna Convention itself and that its withdrawal from the Optional Protocol would apply only to future cases and have no effect on this case or the obligation to comply with the *Avena* judgment. *See* U.S. Dep't. of State, Daily Press Briefing, Mar. 10, 2005, available at http://www.state.gov/r/pa/prs/dpb/2005/43225.htm (last visited June 27, 2007).

[9] *See, e.g.*, Br. for U.S. as Amicus Curiae at 21, *Ex parte Medellín* (acknowledging international obligation to comply with *Avena* decision); Br. Amicus Curiae of United Mexican States in Supp. of Medellín at 28-29, *Ex parte Medellín* (calling on United States to comply with obligation to abide by *Avena* decision); Respondent's Br. at 34, *Medellín v. Dretke* (acknowledging "obligation to respect the ICJ's judgments").

even as to the ICJ itself," they are not binding precedent in courts of the United States. *Id.* Accordingly, the Court proceeded to interpret Article 36 of the Vienna Convention itself, giving "only . . . 'respectful consideration' " but not binding precedential effect to the ICJ's interpretation. *Id.* at 2685.

Here, by contrast, the issue is not the effect of the ICJ's *interpretation* as a *precedent*, but the effect of the ICJ's *decision* as a *judgment*. Unlike the petitioners in *Sanchez-Llamas*, Mr. Medellín is a national of Mexico whose case was specifically adjudicated in *Avena*, and the United States is undisputedly bound "in respect of [his] particular case." ICJ Statute, art. 59. Thus, the interpretation of Article 36 of the Vienna Convention—regarding which the ICJ and this Court came to differing conclusions—is simply not an issue in this case. Instead, the issue is the enforceability of a valid final judgment that is binding on the United States by treaty. Indeed, the United States takes the position that the *Avena* judgment must be enforced in this case even while disagreeing with its interpretation of the Vienna Convention. *See, e.g.*, Br. for U.S. as Amicus Curiae on Pet. for Cert. at 12.[10]

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[10] Similarly, in *Breard v. Greene*, 523 U.S. 371 (1998), this Court did not address the effect of an ICJ judgment. At the time of the *Breard* decision, the ICJ had not adjudicated the merits of Mr. Breard's claim, but had only indicated provisional measures that the United States stay Mr. Breard's execution until the ICJ could consider his case. The United States urged the Court to deny relief in *Breard*, arguing that, by its terms, the order was not mandatory, and advising the Court that in any event, under the terms of the UN Charter and ICJ Statute, indications of provisional measures by the ICJ were not binding. *See* Brief for U.S. as Amicus Curiae, at 49-50, *Breard v. Greene*, 523 U.S. 371 (1998) (No. 97-1390). Thus, this Court proceeded to address not the effect of an ICJ judgment, but only whether the Vienna Convention itself required relief as an original matter. *See Breard*, 523 U.S. at 375-76; *see also Sanchez-Llamas*, 126 S. Ct. at

B. Texas Is Bound by the United States Constitution to Comply with the *Avena* Judgment.

To enable the United States to negotiate treaties with foreign powers as a single nation, the Constitution places the treatymaking power squarely in the hands of the federal government by including it among the Article II powers of the executive branch. U.S. CONST. art. II, § 2, cl. 2. The Constitution makes this power exclusive to the federal government by expressly withdrawing from the states the power independently to make treaties or otherwise conduct foreign affairs. U.S. CONST. art. I, § 10.

The Constitution also places the treatymaking power squarely in the hands of the political branches by providing that the President "shall have Power, with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2. The requirement of senatorial consent by supermajority vote ensures that the United States will enter into treaties only with the strong support of the elected representatives of the American people.

Once a treaty is ratified in accordance with the Constitution, the Supremacy Clause gives it the status of supreme federal law, preempting the laws of the individual States in the same manner as acts of Congress and the Constitution itself:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties made, or which shall be made*, under the

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2667. Here, by contrast, the ICJ has issued a final decision in the case of Mr. Medellín and the other Mexican nationals covered by the *Avena* judgment, and the United States has recognized that that judgment is binding in the particular cases that it adjudicated.

> Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2 (emphasis added). In other words, the Constitution makes explicit that treaties bind the Nation as a whole and are not left to the possibly inconsistent policies of the individual states. "A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236 (1796) (opinion of Chase, J.).

The inclusion of treaties within the Supremacy Clause addressed a serious problem under the Articles of Confederation. In the early years of its independence, the United States had concluded treaties with France and Great Britain granting certain privileges and immunities—both civil and criminal—to nationals or former nationals of those nations. For example, the 1783 peace treaty with Great Britain prohibited prosecutions and confiscations of property on grounds of having aided Britain during the Revolutionary War, and required the release of individuals then being detained on such charges. *See* Treaty of Peace, U.S.-Gr. Br., art. 6, Sept. 3, 1783, 12 Bevans 8.

State legislatures adopted laws contrary to the treaties, however, and with limited exceptions, local officials and judges applied those state laws in disregard of the United States's treaty obligations.[11] As a result, foreign

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[11] *See generally* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1102-33 (2000). *See also, e.g.*, THE FEDERALIST NO. 22, *supra*, at 183 ("The treaties of the United States under the present [Articles of Confederation] are liable to the infractions of thirteen different legislatures, and as many dif-

powers began to doubt the wisdom of concluding further treaties with the United States, and fears arose that the states' noncompliance with the Nation's treaty obligations would lead foreign powers to resort to war against the United States.[12] As Alexander Hamilton remarked:

> The faith, the reputation, the peace of the whole Union are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?

THE FEDERALIST NO. 22, at 183 (Alexander Hamilton) (Clinton Rossiter ed., 1961).[13]

By making treaties part of the "supreme Law of the Land," binding on all constituent organs and political subdivisions of the United States, the Framers ensured that the legal effect of treaties under United States law would correspond to their legal effect under international

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ferent courts of final jurisdiction, acting under the authority of those legislatures."); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (James Madison) (Max Farrand ed., rev. ed. 1966) ("The tendency of the States to . . . violations [of the law of nations and of treaties] has been manifested in sundry instances.").

[12] *See, e.g.*, Golove, *supra* note 11, at 1116, 1128-29.

[13] *See, also, e.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 11, at 316 (James Madison) ("A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole."); *cf. Chy Lung v. Freeman*, 92 U.S. 275, 278-80 (1876) (if California "should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?").

law. They thereby ensured that the United States, as a single nation, would be able to act effectively in international affairs.

II. State Courts Have a Constitutional Obligation to Apply the *Avena* Judgment, and the President Properly Took Action to Ensure That They Faithfully Execute That Obligation.

A. The Constitution Requires State Courts to Enforce Treaties As Federal Law.

By the Supremacy Clause, the Framers did not simply make "all Treaties made, or which shall be made, under the Authority of the United States," a species of supreme federal law. U.S. CONST. art. VI, cl. 2. They also expressly commanded that "the Judges in every State shall be bound" by that species of federal law, "any Thing in the Constitution or laws of any State to the Contrary notwithstanding," just as they are bound by "[t]his Constitution, and the Laws of the United States" enacted by Congress. *Id.* By parallel language in Article III, the Framers placed cases arising under treaties within the federal judicial power: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority." U.S. CONST. art. III, § 2, cl. 1. They thereby made explicit the obligation of judges in the United States, both state and federal, to ensure compliance with the United States's treaty obligations.

The Framers considered judicial enforcement of treaties essential to the maintenance of our international commitments. As James Wilson stated in the course of the Pennsylvania debates over ratification of the Constitution,

> the provision for judicial power over cases arising under treaties, sir, will show the world that we make

> the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect.

2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 490 (Jonathan Elliot 2d ed. 1881). Alexander Hamilton also underscored the importance of the courts, and in particular of this Court, in enforcing treaties:

> The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import . . . must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one supreme tribunal.

THE FEDERALIST NO. 22, *supra*, at 150.

Consistent with the constitutional design, this Court has long held that a ratified treaty

> is a law of the land as an act of Congress is, *whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.* And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

Head Money Cases (Edye v. Robertson), 112 U.S. 580, 598-99 (1884) (emphasis added). *See United States v. Rauscher*, 119 U.S. 407, 417-19 (1886) (explaining *Head Money* and other precedents). Here, the treaty requirement at issue—to provide review and reconsideration in a judicial process meeting the criteria laid down in *Avena*—is, by definition, a rule establishing rights "of a nature to be enforced in a court of justice."

Head Money, 112 U.S. at 599. Indeed, a court of justice is the *only* place the right could be enforced. Thus, the result in this case follows inexorably from the long and uninterrupted line of cases in which this Court has made clear, in civil and criminal cases alike, that courts must in individual cases apply, as the "rule of decision," *Head Money*, 112 U.S. at 599, treaties duly ratified by the President with the advice and consent of the Senate, even if those treaties conflict with state law in areas of traditional state concern.[14]

In short, once the United States ratified the Optional Protocol, the UN Charter, and the ICJ Statute, "the Judges [of Texas were] bound thereby, any Thing in the Constitution or Laws of [that] State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. That command, without more, would require the Texas court to afford review and reconsideration on an application by a Mexican national afforded that relief by the *Avena* judgment.

B. The President Has the Power and Duty to Take Care That the United States's Treaty Obligations Are Faithfully Executed.

Article II of the Constitution provides that the President "shall take Care that the Laws be faithfully exe-

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[14] *See, e.g., El Al Israel Airlines v. Tseng*, 525 U.S. 155, 175-76 (1999) (state law preempted as to personal injury liability); *Kolovrat v. Oregon*, 366 U.S. 187, 196-97 (1961) (state law preempted as to property ownership); *Asakura v. Seattle*, 265 U.S. 332, 343 (1924) (state law preempted as to local business regulation); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561-62 (1832) (state law preempted as to criminal prosecution); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 627 (1813) (state law preempted as to property forfeiture); *see also Wildenhus's Case*, 120 U.S. 1, 17 (1887) (treaty ousting state courts of jurisdiction over crime within state's borders would be enforceable in federal court by habeas corpus).

cuted." U.S. CONST. art. II, § 3. It has long been recognized that the "Laws" to which this section refers include treaties of the United States. *See, e.g., Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893); *In re Neagle*, 135 U.S. 1, 63-64 (1890). And as this Court has made clear, the President's power and duty under this clause is not "limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms," but also includes authority to take such steps as he concludes are necessary to carry into effect "the rights, duties and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution." *Neagle*, 135 U.S. at 64.

To ensure that treaty obligations are faithfully executed, the President may bring suit against a political subdivision of the United States, and he needs no statutory authorization to do so. *See Sanitary Dist. v. United States*, 266 U.S. 405, 425-26 (1925) (federal Executive did not require congressional authorization to sue state agency to enforce treaty); *Mexican Boundary—Diversion of the Rio Grande*, 26 Op. Att'y Gen. 250 (1907) (federal Executive could sue private corporation to enforce judgment of international commission that was binding by treaty); *see also, e.g., United States v. Republic Steel Corp.*, 362 U.S. 482, 492 (1960) (federal Executive could sue to enforce federal law even beyond specific remedies established by statute). The President may also take other steps that he deems appropriate to enforce federal laws without specific Congressional authorization. *See, e.g., Cooper v. Aaron*, 358 U.S. 1 (1958) (dispatch of federal troops); *Neagle*, 135 U.S. at 63-68 (dispatch of federal marshal).

Where neither the treaty itself nor a federal statute prescribes the means by which a treaty is to be imple-

mented, the President's authority under the Take Care Clause includes the power to choose the means of enforcement. For example, the Jay Treaty of 1794 provided for the extradition of fugitives to Great Britain, but neither the treaty nor a statute specified the procedure to be followed. *See* Treaty of Amity, Commerce and Navigation, U.S.-Gr. Br., art. 27, Nov. 19, 1794, 8 Stat. 116, 129. Under the authority of the treaty, President John Adams issued a warrant for the arrest and extradition to Great Britain of an individual accused of murder on the high seas. Expressing views that this Court has endorsed as "masterly and conclusive," *Fong Yue Ting*, 149 U.S. at 714, then-Representative John Marshall explained why, in the absence of specification by Congress of the means of implementation, this action was within the President's authority:

> The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. . . . Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the [treaty]; but, till this be done, it seems the duty of the executive department to execute the [treaty] by any means it possesses.

Speech of John Marshall, 10 ANNALS OF CONG. 596, 613-14 (1800), *reprinted in* 18 U.S. (5 Wheat.) app. 3, 27; *accord United States v. Cooper*, 25 F. Cas. 631, 642 (C.C.D. Pa. 1800) (Chase, J., on circuit) (Jay Treaty was "the law of the land," and President had authority to execute its extradition provision). Moreover, the President

has long exercised the responsibility "to defend and protect and provide procedure for enforcing the rights that are given to aliens under treaties made by the Government of the United States." Remarks of President Taft to Members of Am. Soc'y of Int'l Law (Apr. 29, 1910), 18 William H. Taft papers, series 9A, at 206 (Library of Congress microfilm).

Here, the President has directed that "the United States will discharge its international obligations under [*Avena*] by having state courts give effect to the decision" in the case of Mr. Medellín and others similarly situated. Pet. App. 187a. As he has explained, this means that "in order to obtain 'review and reconsideration' of their convictions and sentences in light of the decision of the ICJ in Avena, the 51 named individuals may file a petition in state court seeking such review and reconsideration, and the state courts are to recognize the *Avena* decision." Br. for U.S. as Amicus Curiae Supporting Resp't at 42, *Medellín v. Dretke*.

The President's choice of the means by which the United States would discharge its obligations under the *Avena* judgment falls squarely within his authority to take care that the United States's treaty obligations are faithfully executed. *First*, the President's choice of means fully comports with the treaty right at issue. A treaty requirement, just like a constitutional or statutory requirement, may call for legislative, executive, or judicial action. *See, e.g.*, *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1861 (2006) (quoting 4 PAPERS OF JOHN MARSHALL 95 (C. Cullen ed. 1984)). The "review and reconsideration" of convictions and sentences in accordance with the standards adopted in the *Avena* judgment is a quintessentially judicial function that the state courts are well equipped to carry out. *See Avena*, ¶¶ 140-143 (Pet. App. 174a-176a); *see also* Br. for U.S.

as Amicus Curiae Supporting Resp't at 41, *Medellín v. Dretke* (noting "the suitability of judicial review as a means of compliance").

Second, the President's choice of means utilizes state procedures already available. Every state, including Texas, provides judicial procedures for post-conviction review of convictions and sentences. *See, e.g.*, Tex. Code Crim. Proc. art. 11.071. The President's determination allows the Mexican nationals whose rights were adjudicated in *Avena* to use those existing procedures to obtain the required review and reconsideration, and directs the state courts to give preemptive effect in those cases to the *Avena* judgment as required by treaty. *See Testa v. Katt*, 330 U.S. 386 (1947).

Third, the President's choice of means shows "proper respect for state functions" by allowing federal questions concerning the state criminal process to be heard in the first instance in state courts. *Younger v. Harris*, 401 U.S. 37, 44 (1971) (federal courts should not hear challenges to pending state-court criminal prosecutions when those challenges can be resolved in state court). Indeed, federal law requires the exhaustion of state remedies before the federal courts can grant habeas corpus, *see* 28 U.S.C. § 2254(b)(1)(A), and there may be federal law obstacles to federal habeas review of state court application of federal law that do not apply in the state court itself, *see Medellín v. Dretke*, 544 U.S. at 664-66. These requirements are premised, however, on the obligation of state courts faithfully to *apply* federal law, not on any option to *disregard* it.

Finally, by directing state courts to recognize *Avena* on petitions seeking the review and reconsideration ordered by *Avena*, the President did not make law, as the Texas plurality erroneously suggested. Pet. App. 48a. He did not purport to interpret the Vienna Convention;

indeed, the United States has made clear that it disagrees with the result reached in *Avena*. Br. for U.S. as Amicus Curiae Supporting Resp't at 42, *Medellín v. Dretke*. Rather, the President directed that state courts, in cases brought before them, apply existing federal treaty law as a means of carrying that law into effect.

By its express mandate, the Supremacy Clause requires the enforcement by state courts of this Nation's treaty obligations. *See supra* Part II.A. If anything further were necessary to make that legal obligation judicially enforceable as a matter of domestic law, then the President, as the officer given the power to execute the laws, has taken that step by his determination. By doing so, he did not create any new obligation to be imposed upon the state courts, but merely removed any arguable obstacle to judicial enforcement of the relevant treaty obligations in accord with the constitutional command. At most, therefore, the President's choice of means of treaty enforcement reinforced the choice made by the Supremacy Clause. At the same time, the President's determination eliminated any possible concern that compliance by a state court with its duty to give effect to the treaty obligation by enforcing the Avena judgment might interfere with the President's conduct of the Nation's foreign affairs. *See* Part III below. There is no reason to suppose the President's determination insufficient to require compliance when he has the undoubted authority to sue to achieve the same result. *See Sanitary District*, 266 U.S. at 425-26.

III. The President's Determination That the United States Would Abide by Its Obligation to Comply with a Treaty Obligation Is a Valid Exercise of His Foreign Affairs Authority.

A. The President Has Independent Authority to Conduct the Nation's Foreign Affairs.

In addition to the power to enter into treaties with the advice and consent of the Senate, the Constitution confers on the President independent authority to formulate and execute the Nation's foreign policy. By vesting "[t]he executive Power . . . in a President of the United States of America," U.S. CONST. art. II, § 1, and by virtue of the powers "inherent" in a national government, the Constitution makes clear that the President, the "Head of State," is "the sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). "[T]he historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations,' " and as a result, there is no question "that there is executive authority to decide what [foreign relations policy] should be." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)).[15]

In considering the authority of the President to seize private steel mills in support of the Korean War, Justice

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[15] *See also First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (plurality opinion) (the President has the "lead role . . . in foreign policy"); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him . . . as the Nation's organ in foreign affairs.").

Jackson, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), provided a means for assessing the scope of presidential powers, which "fluctuate depending upon their disjunction or conjunction with those of Congress." *Id.* at 635. Justice Jackson reasoned that presidential authority is at its maximum "when the President acts pursuant to an express or implied authorization of Congress," in a "zone of twilight" when the President "acts in absence of either a congressional grant or denial of authority," and "at its lowest ebb . . . [w]hen the President takes measures incompatible with the expressed or implied will of Congress." *Id.* at 635-38 (Jackson, J., concurring).

In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), this Court applied Justice Jackson's framework to uphold Executive Orders promulgated by the President that nullified judicial attachments, effectuated transfers of certain funds out of the country, and suspended claims of American nationals against Iran in favor of binding arbitration in an international tribunal established by an executive agreement. *Id.* at 668-69. The Court upheld the President's power to nullify attachments based upon the explicit Congressional authorization given to the President under the International Emergency Economic Powers Act, 50 U. S. C. §§ 1701-1706. *Id.* at 674. The Court also held that while there was no "specific authorization" for the President to suspend claims in United States courts, there did exist strong evidence of a "history of congressional acquiescence" in unilateral action by the President to settle disputes with other nations. *Id.* at 678-79. Holding that "the President does have some measure of power to enter into Executive agreements [to settle disputes between nations] without obtaining the advice and consent of the Senate," *id.* at 682 (citing *United States v. Pink*, 315 U.S. 203, 229-30 (1942)), the Court found that the longstanding practice of the Presi-

dent to take action to settle claims to resolve "sources of friction" with foreign nations had implicit Congressional approval and thereby enjoyed a presumption of validity. *Id.* at 679-84, 686.

Most recently, in *Garamendi*, 539 U.S. 396 (2003), the Court considered whether a California statute requiring in-state insurers to disclose information about Holocaust-era policies in order to settle claims through litigation was preempted by executive agreements that required the United States to use its "best efforts" to protect such companies from litigation in exchange for the foreign companies' contributions to a claims settlement fund. *Id.* at 401, 406. Relying squarely on the President's foreign affairs authority, the Court determined that the President's settlement of claims with foreign nations required "no ratification by the Senate or approval by Congress" since "in foreign affairs[,] the President has a degree of independent authority to act" that has long been exercised, with the acquiescence of Congress, to settle claims with foreign nations. *Id.* at 414-15, 424 n.14. As a result, the Court concluded that the state statute in question impermissibly interfered with the conduct of foreign policy by the executive branch of the federal government. *Id.* at 401.

In sum, as the Court's decisions in *Youngstown*, *Dames & Moore* and *Garamendi* demonstrate, when the President acts with Congress's express or implicit approval or acquiescence, his "authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring); *see also Dames & Moore*, 453 U.S. at 668. Even in the absence of such approval or acquiescence, the President has a degree of "independent authority" to act. *Garamendi*, 539 U.S. at 414; *see also Youngstown*, 343 U.S. at 637

(Jackson, J., concurring); *United States v. Belmont*, 301 U.S. 324, 331 (1937). And action by the President in the exercise of his foreign affairs authority preempts inconsistent state law.[16]

B. The President's Determination Lies Squarely Within His Authority to Conduct the Nation's Foreign Affairs.

Exercising his foreign affairs authority, the President has determined that the United States must comply with the *Avena* judgment. As the United States earlier explained to this Court, the President's determination involved

> delicate and complex calculations . . . taking into account the need for the United States to be able to enforce its laws effectively against foreign nationals in the United States, the need for the United States to be able to protect Americans abroad, judgments about the likely responses of various foreign countries to potential United States actions with respect to the Vienna Convention, and other United States foreign policy interests.

Br. for U.S. as Amicus Curiae Supporting Resp't at 41-43, *Medellín v. Dretke*. As the United States also explained, by ordering compliance, the President pur-

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[16] *See Garamendi*, 539 U.S. at 413 ("There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy."); *United States v. Pink*, 315 U.S. at 230-31, 233 ("[S]tate law must yield when it is inconsistent with, or impairs . . . the superior Federal policy evidenced by a treaty or international compact or agreement. . . . No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *Belmont*, 301 U.S. at 331-32 (state laws cannot "be interposed as an obstacle to the effective operation of a federal constitutional power").

sued two objectives he deemed critical: the need for the United States to "resolve a dispute with a foreign government" and "fulfill[ ] its international obligation," *id.* at 41, 45, and the need to preserve the United States's ability "to protect Americans abroad," *id.* at 43.

The President's determination constitutes a quintessential foreign policy judgment made at the zenith of his authority. Put simply, the President has done nothing more than determine that the United States will do what the elected representatives of the American people, by the treatymaking processes prescribed by the Constitution, have promised Mexico and the rest of the parties to the UN Charter that the United States, including Texas and its courts, will do: abide by the *Avena* judgment. In making that determination, the President entered into no new international agreements, prescribed no new rules, established no new procedures, and undertook no new obligations. Instead, he merely confirmed that the United States would comply with international commitments already made by the constitutionally designated political actors. No more modest exercise of his foreign affairs authority, nor any with clearer authorization from the appropriate political branches, could be conjured. *See* Part III.A.

Indeed, especially in light of the unequivocal treaty obligation, the President had far greater latitude than he employed. *First*, this Court has repeatedly recognized that the President has the authority to peaceably resolve disputes with other nations even without congressional participation. *See, e.g., Garamendi*, 539 U.S. at 415; *Dames & Moore*, 453 U.S. at 682; *Pink*, 315 U.S. at 223; *Belmont*, 301 U.S. at 330-31. In recognizing that authority, the Court has emphasized Congress's own acquiescence in the exercise of that authority. That authority is conclusive here: If, in order to settle a dispute with

another country, the President has the authority to suspend proceedings in courts in the United States, *Dames & Moore*, 453 U.S. at 686, or to preclude the application of state disclosure laws in order to preserve the efficacy of an international dispute resolution mechanism as the exclusive forum for the resolution of a class of private claims, *Garamendi*, 539 U.S. at 420-21, then the President surely has the authority to designate state courts as the forum in which to hear treaty claims arising from the state's own conduct, even if those courts were not already under a constitutional mandate to do so.[17]

Second, Congress has regularly expressed its expectation that the President will act to protect American interests abroad, including by affording reciprocal protection of foreign interests in the United States. For example, the Omnibus Diplomatic Security and Antiterrorism Act of 1986 authorizes the Secretary of State, an executive branch official who acts at the President's direction, to prescribe policies for the protection not only of foreign missions and officials but also of "other foreign persons in the United States, as authorized by law." 22 U.S.C. § 4802(a)(1)(D). In addition, the President has long had the statutory authority to use all "means, not amounting to acts of war and not otherwise prohibited by law" to secure the release of Americans wrongfully detained abroad, 22 U.S.C. § 1732, a goal

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[17] From the Nation's infancy, the federal political branches have repeatedly determined that it was within the interests of the United States to submit disputes with other nations to binding adjudication by international tribunals. *See generally* Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833 (2007); Walter Dellinger, U.S. Dep't of Justice, Ofc. of Legal Counsel, *Constitutional Limitations on Federal Government Participation in Binding Arbitration* (Sept. 7, 1995) (citing and discussing authorities), *available at* http://www.usdoj.gov/olc/arbitn.fin.htm (last visited June 24, 2007).

that will often require assurances of reciprocal protections for aliens detained here. And even in the absence of statutory authorization, the President has long exercised broad authority to protect the safety and interests of Americans abroad. *See, e.g., Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (Nelson, J., at circuit).

In this case, the President has determined that "[c]onsular assistance is a vital safeguard for Americans abroad," and that "unless the United States fulfills its international obligation to achieve compliance with the ICJ *Avena* decision, its ability to secure such assistance could be adversely affected." Br. for U.S. as Amicus Curiae Supporting Resp't at 41, *Medellín v. Dretke*. As the State Department told the Senate Foreign Relations Committee at the time of ratification of the Vienna Convention, "[t]he United States government has to consider the Vienna Convention both from the viewpoint of the United States as a sending state and from the viewpoint of the United States as a receiving State." S. EXEC. REP. No. 91-9, at 8 (1969) (statement of Deputy Legal Adviser J. Edward Lyerly). Indeed, the reciprocal protection of the person and property of nationals abroad has been a frequent subject of treatymaking by the United States and its treaty partners from the Nation's founding through the present day. *See, e.g., Asakura*, 265 U.S. at 341 (citing *Baldwin v. Franks*, 120 U.S. 678, 682 (1887)) ("Treaties for the protection of citizens in one country residing in the territory of another are numerous, and make for good understanding between nations.").

Finally, Congress has conferred on the President and Secretary of State the responsibility for conducting our relationship with the United Nations. *See* 22 U.S.C. §§ 287(a), 287a. That grant should encompass the

authority to determine the means by which the United States will comply with its obligation under the UN Charter to abide by a decision of the ICJ, which is an organ of the United Nations.

C. No Additional "Executive Agreement" Is Needed.

The Texas court made explicit that "[t]he absence of an executive agreement between the United States and Mexico [was] central to [its] determination that the President ha[d] exceeded his inherent foreign affairs power by ordering [that court] to comply with *Avena*." Pet. App. 46a. According to the Texas court, the absence of such an agreement rendered *Belmont*, *Pink*, *Dames & Moore*, and *Garamendi* inapposite and placed the President's authority " 'at its lowest ebb.' " *Id.* at 44a-45a.

Contrary to the Texas court's assumption, the President does not need Mexico's permission in order to determine that the United States will comply with its treaty obligation or, for that matter, to choose the means of compliance. *First*, the President here acted pursuant to a series of treaties, comprising the UN Charter, the ICJ Statute, and the Optional Protocol, each of which mandates compliance with the *Avena* judgment. Hence, the international agreement the Texas plurality so desperately sought can easily be found, if needed, in those treaties, which—unlike executive agreements—are instruments of a type expressly provided for in the Constitution and have received the assent not only of the President but also the Senate.

Second, it is not clear what the Texas court thought needed to be settled in the negotiations over an implementing executive agreement. Given its initiation and pursuit through judgment of *Avena*, and the briefs it has filed in this Court calling on the United States to com-

ply, there can be no doubt that Mexico seeks compliance. And surely the Texas court did not mean to suggest that the President needed to settle with Mexico on the means by which it would comply. For one thing, the ICJ made clear that, so long as the means satisfied the criteria set forth in the judgment, the United States could provide review and reconsideration "by means of its own choosing." *Avena*, ¶ 153(9) (*dispositif*) (Pet. App. 185a). For another, the Constitution provides that means for the United States, in any event, by way of the mandate to state courts in the Supremacy Clause.

Finally, contrary to the Texas court's assumption, an executive agreement has no special constitutional significance, and the President need not exercise his foreign affairs authority in accord with any particular procedure. This Court has given preemptive effect to executive agreements because to do otherwise would allow states to interfere in the President's conduct of the Nation's foreign affairs authority. But the President may exercise its foreign affairs authority in other ways as well: This Court has inferred an executive agreement from exchanges of correspondence, *Belmont*, 301 U.S. at 326, and has even gleaned a national foreign policy sufficient to preempt state law from the congressional testimony of executive branch officials, *Garamendi*, 301 U.S. at 326.[18]

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[18] Moreover, contrary to the position taken in Judge Cochran's concurrence, no special formality is required for a presidential memorandum, determination or other directive to be legally effective. The legal effect of presidential action depends on its substance, not the form in which it was issued. *Wolsey v. Chapman*, 101 U.S. 755, 770 (1880); Dep't of Justice, Ofc. of Legal Counsel, Mem. for Counsel to President, *Legal Effectiveness of a Presidential Directive, As Compared to an Executive Order* (Jan. 29, 2000), *available at* http://www.usdoj.gov/olc/predirective.htm (last visited June 24, 2007). Over the years, Presidents have issued not only Executive Orders and

IV. The Texas Procedural Bar Applied by the Texas Court Is Preempted.

The UN Charter, the ICJ Statute, and the Optional Protocol obligate the United States, including its constituent states and their courts, to abide by the *Avena* judgment as a matter of international law. *See* Part I.A above. The Supremacy Clause makes that obligation part of federal law, *see* Part I.B above, and requires state courts to enforce it, *see* Part II.A above. In addition, exercising his authority to take care that the United States's treaty obligations be faithfully executed and his authority to conduct the United States's international affairs, the President has determined that the United States will discharge its obligations under *Avena* by giving effect to that decision in state courts. *See* Parts II.B and III above. Hence, as a matter of preemptive federal law, the Texas Court of Criminal Appeals had an obligation to apply the *Avena* judgment on Mr. Medellín's application for review and reconsideration.

The *Avena* judgment requires the United States to provide, as a remedy for the Article 36 violation, "review and reconsideration of the conviction[ ] and sentence[ ] of" Mr. Medellín, "by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of [that] Judgment." *Avena*, ¶ 153(9) (*dispositif*) (Pet. App. 185a). Moreover, the process by which the review and reconsideration is effected must "guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account." *Id.* ¶ 138 (Pet. App.

Proclamations but also a wide variety of other types of directives. *See generally* CRS Report for Congress, *Presidential Directives: Background and Overview*, No. 98-611 GOV (updated April 23, 2007). Judge Cochran's suggestion that the President can take effective action only through a formal Executive Order or Proclamation published in the *Federal Register* lacks any legal support.

173a). Hence, a procedural bar that prevents the Texas court from giving effect to *Avena* "must give way." Br. for U.S. as Amicus Curiae Supporting Resp't at 43, *Medellín v. Dretke*.

In order to obtain the review and reconsideration to which he is entitled, Mr. Medellín invoked the mechanism available under Texas law by filing an application for post-conviction relief in the Texas Court of Criminal Appeals. *See* Tex. Code Crim. Proc. art. 11.071. That court, however, refused to order the review and reconsideration of Mr. Medellín's case required by *Avena*. Instead, it held that relief was foreclosed by a Texas procedural default statute, Tex. Code Crim. Proc. art. 11.071, § 5(a)(1), because the Vienna Convention violation arose from facts and law in existence at the time of Mr. Medellín's original trial. Pet. App. 56a-64a. By refusing to provide the review and reconsideration required by *Avena* on the basis of a procedural bar that fell before that remedy was ordered, the Texas court contravened the requirements of *Avena*.

The Texas procedural default statute, as interpreted and applied by the Texas Court of Criminal Appeals, is thus flatly inconsistent with the treaties requiring the United States to abide by the *Avena* decision, which requires review and reconsideration of Mr. Medellín's conviction, and with the President's determination, which requires that the *Avena* decision be given effect in Mr. Medellín's case. Thus, the Texas statute is preempted in the circumstances of this case, and the Texas court erred in applying it.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court reverse the judgment of the Texas Court of Criminal Appeals and remand petitioner's case for review and reconsideration consistent with the *Avena* judgment and the President's determination.

Respectfully submitted,

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